Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. .....

OCTOBER TERM—1976

76-1366

CHARLES INDIVIGLIA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARNOLD E. WALLACH
A Member of the Bar of the
United States Supreme Court
Attorney for Petitioner
11 Park Place
New York, N.Y. 10007
(212) 227-0959

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

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Petitioner, CHARLES INDIVIGLIA, respectfully requests that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals, Second Circuit, entered on or about February 7, 1977, affirming the judgment of the United States District Court, Southern District of New York, convicting the petitioner of a conspiracy to violate 21 U.S.C. 812, 841(a)(1), and 841(b)(1)(a), making it an offense to distribute and possess with intent to distribute narcotics, under 21 U.S.C. 846 under the first count of the indictment, and the illegal distribution of and possessing with an intent to distribute narcotics in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(a).

As a consequence of the conviction the petitioner was sentenced under the first count of the indictment charging

conspiracy as aforesaid to a five (5) year term of imprisonment to be followed by a six (6) year period of special parole, and additionally under the second count of the indictment, a suspended sentence, the petitioner to serve a five (5) year probation term in lieu thereof pursuant to 28 U.S.C. 4208(a)(2), said period of probation to commence as of the time of the imposition of the sentence.

JURISDICTION

The order of affirmance of the United States Court of Appeals, Second Circuit, is dated February 7, 1976 and a copy of said order and opinion is reprinted herein as Appendix A, *infra*, the same being contained in the opinion of the said Circuit Court of Appeals for the Second Circuit.

The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1).*

QUESTIONS PRESENTED

1. Was there a fatal variance between the proof presented at trial and count 1 of the indictment charging an overall conspiracy and was there a prejudicial variance when the evidence introduced disclosed multiple conspiracies and should the Court have granted the petitioner a severance by reason thereof, or at the very least a judgment of acquittal, the Court having granted a severance to a then co-defendant who was circumstanced similarly to petitioner?

*The petitioner's time to serve and file this petition was enlarged to April 8, 1977 by Associate Justice of the U.S. Supreme Court, Thurgood Marshall, also Circuit Justice, Second Circuit.

2. Was the summation of the prosecutor excessive and did it transcend the limits of fair comment?

THE PRINCIPAL CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES OF CRIMINAL PROCEDURE RELIED UPON

AMENDMENT V (In Part)

> ". . . No person . . . be deprived of life, liberty, or property, without due process of law; . . ."

RULE 8 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE:

> "(b). Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

RULE 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE:

> "Relief From Prejudicial Joinder. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in

camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial. . . ."

STATEMENT OF THE CASE

THE FACTS

The Government's case against CHARLES INDIVIGLIA was based principally on two witnesses, one Albert Rossi and Peter Mengrone. The Government's case commenced with the testimony of Mr. Rossi. Rossi's criminal and sordid background was initially brought out by the Government attorney during direct examination (A1-A18).*

Rossi testified that he entered the narcotics business after meeting a co-defendant named Angelo Ricco and his brother Anthony Ricco. After identifying the defendants at trial, Rossi testified that he owed Anthony Ricco $5,000 (A19-A24). Unable to repay this sum he arranged to pay it off in $25.00 weekly installments which he didn't make (A26, A27). In October or November of 1971 he met Angelo and Anthony Ricco at the Rosedale Social Club, Rossi giving its location as being across the street from a bar called the Garden of Roses (A26, A27).

Rossi offered to repay the loan from the proceeds of proposed narcotic sales, provided he was supplied with the narcotics from the Riccos (A28). The Riccos agreed to this new arrangement (A28, A29). At that time Rossi worked for the Thruway Taxi Co. where he met a co-defendant Freddie Blase. He told Blase that he had a narcotic source (A30). He later met Angelo Ricco who told him he would

*( ) This refers to the pagination of the Appendix furnished by the petitioner CHARLES INDIVIGLIA.

later given him an "ounce" (A32). At a subsequent meeting attended by Rossi, Blase and Angelo Ricco in October or November of 1971 at a bar called the "Chester House" in the Bronx, Angelo Ricco transferred an ounce of heroin to him for a price ranging from $700 to $800 to be paid in a week thereafter (A32, A33). Rossi then made possible arrangements with others for the resale of this drug (A36, A37).

He was successful in reselling the heroin for $1,500 and he paid the original cost to Angelo Ricco dividing the remainder with Blase (A38, A39). Rossi then received another ounce from Angelo Ricco of narcotics (A38, A39). This was resold to a Robert Mentesti and the profit divided with Blase after paying Angelo Ricco the original price (A41). He related three or four more transactions with Angelo Ricco (A41). He also recounted resales to one Corrado and Mentesti (A43).

Working with Blase, Ricco made $1,500 weekly (A45). At this stage he explained this partnership included Anthony and Peter Criscenti (A45). The time span of the transfers from Angelo and Anthony Ricco was between December 1971 to July 1972 (A46). The transactions were sporadic (A47, A49). Rossi claimed that the Riccos were the persons who arranged deliveries of narcotics to him (A49).

Rossi further testified that as to deliveries he spoke to Angelo Ricco and "sometimes Indiviglia" (A51). At "some" of the meetings with Ricco the petitioner INDIVIGLIA was present (A51, A52).

According to Rossi, INDIVIGLIA made deliveries of narcotics to him and Blase in a restaurant they operated (A53). He fixed the time in March 1972 as one occasion (A53).

Rossi further related that he and Blase were at this restaurant and that the defendant Angelo Ricco and another person appeared. That the petitioner went to the men's room and shortly thereafter rejoined them, telling Rossi that he put two ounces of a narcotic in a garbage pail (A54).

Rossi and Blase operated this restaurant from October 1971 to December 1972.

Upon meeting Anthony Ricco, INDIVIGLIA was with him at the "club" (A55). During this time Rossi paid Anthony Ricco (A56).

In April 1972 Rossi left New York and went to Miami with Blase, the Criscentis and Corrado (A56, A58, A59, A95). The following July of 1972 Rossi left New York with Blase and a Robert Browning going to Puerto Rico (A60, A61). There he met the co-defendant James Rizzieri (A62, A63). Rizzieri spoke to Rossi about the narcotic business and ultimately became his partner replacing Blase who dropped out (A63, A64).

Upon returning to New York Rossi met the Riccos at the "club" (A65). He was asked whether anyone else was present and Rossi replied "I think so yes", naming the petitioner (A66). This was stricken out (A66). He fixed the time as being July or August of 1972 (A67). Rossi then corrected himself and testified he met with the Riccos and not the petitioner (A68).

At this meeting Rossi told the Riccos that Blase was no longer working with them and that Rizzieri replaced him (A68). He asked the Riccos to supply him with greater quantities of narcotics (A68). Rossi's outlet at this phase was one Mentesti and according to Rossi one of the Riccos asked him whether one Sally Larca was a partner with Mentesti and whether Larca knew that the Riccos were the

source of the narcotics (A71). Rossi also told one of the Riccos that he was going to get rid of his other partners, the Criscentis were "leeches" and that Blase was no longer his partner (A63).

Rossi next explained the continuing phase of his operation with Rizzieri who supplanted his former business associates (A74). In the early part of August 1972 he met with the Riccos, the petitioner being present (A74). At this meeting Rossi discussed supplies with the Riccos (A75). However, the petitioner said nothing (A76). Rossi originally told them that deliveries would be made by "Tony" from Castle Hill Avenue (A76, A77). Later "Tony" made a delivery to him (A77). Rossi then told the jury about a sale to "Pete the Weep" (A79).

After introducing Rizzieri to the Riccos, the Riccos continued to supply the narcotics. Rossi then named his outlets (A80).

The Riccos, according to Rossi, were supplying him with narcotics from the period August 1972 to December 1972 in the area of the "club", the "Magic Carpet", and to the best of his recollection had a clothing store designated as "Renzo Originals" (A83). In regard to the "Magic Carpet" this was a bar and deliveries were made to him outside that place (A84). The Riccos spoke to Rossi about the deliveries at the Rosedale Social Club and the Magic Carpet. The petitioner, INDIVIGLIA, was present, as was Rizzieri (A85). Rossi claimed that these transactions involved $20,000 and after paying the Riccos their price he divided the profit or the remainder of the money with Rizzieri (A86). Rossi specified that the payments to Ricco were made in an establishment called Reeves Industries where the Riccos and the petitioner's brother worked (A87).

In the middle of August 1972 Rossi and Rizzieri went to

the "Club" where they saw Angelo Ricco. Angelo Ricco offered him a kilo of cocaine at a price of $14,000 to $16,000 (A88, A89).* Rossi accepted and made the purchase for Mentesti, one of his customers (A89, A90). The delivery to Rossi was made outside the club in the following way (A91): Rossi and Rizzieri went to their car, parked nearby, and Angelo Ricco procured the narcotics and the petitioner "to the best of his recollection" handed it to him (A92). Rossi was unable to remember who owned the car (A92). In a further effort, Rossi then testified that Angelo Ricco and the petitioner gave him the narcotics at that time and place (A95).

It will be recalled that Rossi testified that Mentesti was a purchaser from him. Mentesti complained of the poor quality of the narcotics and told Rossi to return it (A97). Rossi then arranged to meet Angelo Ricco and the petitioner (A96, A97). He thereafter met Rizzieri, Angelo Ricco and the petitioner and complained to them of the quality of the narcotics previously transferred to him allegedly. The petitioner offered to reduce the price but Rossi rejected this, and insisted upon returning the narcotics (A98).

Rossi also testified that "he found out" that the particular narcotics involved in this transaction belonged to the petitioner (A99). That the petitioner gave him samples of narcotics from August 1972 to December 1972 (A100). However he also admitted he never fully transacted with the petitioner (A100).

Thereupon, the relationship between Rizzieri and Rossi deteriorated and he testified they were having disagreements. He was also complaining to the Riccos

*( ) This refers to the substantive count of the indictment involving the petitioner, count two.

about the quality of narcotics they allegedly were transferring to him (A101, A109-A117). As to these transactions, Rossi gave a lurid account of dealing with others, including one Herbie Sperling and Sperling's partner Gold. He told of having to take back the narcotics from his customers even though the buyers were willing to pay and arming himself with lethal weapons to reduce the taking of money left with him by the buyers and that the Riccos, refusing to rescind transactions, left Rossi liable for a cost ranging between $26,000 to $28,000 (A110, A114-A118, A123, A124).

The following January (1973) Rossi ceased transacting with the Riccos (A125). However, in February 1973 he paid Angelo Ricco one-half the price of the prior transaction previously described, giving him approximately $13,000 (A126, A127). He continued transacting with other individuals not involved in this case (A128).

On cross examination Rossi related that he was a cocaine user and in response to questioning as to whether he used narcotics five or six times daily he answered "he could have" (A132). Further that he asked Anthony Ricco for help when he was involved in criminal actions and this help was refused (A134). He also testified at a prior trial that prior to March 1973 the extent of his narcotics dealing was "small weight," that is he dealt in quantities limited to 2 or 3 ounces (A138). He admitted that narcotic transactions were secret but his trial testimony was that he and Anthony Ricco passed cocaine through an automobile parked in front of the "club" in daylight (A141, A92, A95).

In August 1972 Rossi trafficked cocaine and once prior to that in March 1972 he also trafficked in cocaine (A147). Further that in August 1972 cocaine given to him by the petitioner were samples (A149). When he was interviewed

by the authorities about his narcotic trafficking, he would tell them about the people he was transacting with (A150). Asked about the events in August 1972 that the petitioner was allegedly involved in and whether he informed on the petitioner, Rossi couldn't "recall" (A151, A152). Further cross examined as to his cooperation with the authorities, he testified that he began his cooperation in March 1974. He was then confronted with Defendant's A for identification, which related to his narcotic activities (A153, A154). He was confronted with the Defendant's B for identification, Government's 3501-35 for identification (A157, A158). He was also confronted with Government's 3501-25 for identification (A166); this was dated April 8, 1975 (A160). Again Rossi couldn't recall what, if anything, he told the authorities as to a delivery to him at the restaurant as he previously testified to on direct examination (A53, A163).

Further pressed as to Government's 3501-26 for identification and Defendant's D for identification, Rossi couldn't "recall" whether he told the agents up to the recent period of April 1975, that he dealt with the petitioner (A165).

When interviewed by the agents they questioned him about those he dealt with however (A166).

Ultimately he was asked whether up to May 31, 1974 he ever mentioned the petitioner as a source of narcotics and Rossi replied "I could have" (A169).

On August 8, 1974 when interviewed by the authorities, he couldn't remember whether he referred to the petitioner (A172). Nor did Rossi remember whether on August 14, 1974 at another interview by the authorities he ever told he had a narcotic transaction with the petitioner (A175).

Rossi at a later interview by the authorities, told the

agents of the people he was "associated" with. However at trial he couldn't remember whether he referred to the petitioner (A175, A177, Defendant's F-3 for identification).

When questioned as to whether Rossi ever told the agents of any transactions involving the petitioner during the times he was cooperating, Rossi responded that he didn't know (A178, A179).

On August 20, 1974 Rossi appeared before Judge Carter, United States District Court, Southern District of New York (A180, Government's 3501-10, page 6, lines 6-22 for identification, Defendant's Exhibit H in evidence). This disclosed that Rossi told the Court that he didn't "touch" narcotics until January 1973 when he met one Corallùzzo (A181). He further told the Court at that session that he did not deal in cocaine then as he was a heroin dealer (A182). It may be recalled that the transaction he testified about in August 1972 where he involved the petitioner, involved cocaine.

Before a grand jury four (4) months later, he testified that the petitioner gave him a sample of cocaine for testing (A183, A184). It will be recalled that Rossi told the trial jury in this case that in August 1972 the petitioner gave him cocaine (A184). But before the grand jury, he testified he didn't know who gave him cocaine because Ricco and the petitioner had it and he "assumed" it was the petitioner (A185). He also previously testified that he "assumed" that Ricco and the petitioner were partners (A185).

He explained his trial testimony in the context of the former omissions by saying he "gave it more thought" (A187). On further cross examination he admitted a change in his testimony by stating that the petitioner told him that the cocaine was his (A18). Thus in his grand jury

testimony he never testified as to the ownership of the cocaine (A190). Further cross examination revealed that Rossi suffered brain damage as the result of an assault by an inmate while he was in jail (A207). He also had a history of psychological problems (A207, A208).

On re-cross examination Rossi couldn't recall whether he ever told the U.S. Attorney about the delivery of the samples at the restaurant he was operating (A254). Nor could he recall whether he ever told the authorities prior to trial about the incidents involving the petitioner (A259). That parts of his testimony involving the petitioner were never previously related to the grand jury (A261).

Donald Ferrarone, a government agent, next testified for the prosecution (A264). On November 22, 1972 he arranged for a purchase of heroin from one Angiolillo (A265). At a previously arranged meeting, this witness gave $18,000 to Angiolillo who was in a car, the driver being the co-defendant Rizzieri (A266). On February 5, 1973 he met Rossi. On February 8, 1973 he transacted for a transfer of heroin with Rizzieri (A269). On March 13, 1973 he met Rizzieri (A270, A271). Rizzieri told the agent that he had difficulties with his source; that one of his sources dried out and that he had to deal with others, and that he had a source in Long Island. Ultimately, Rizzieri was arrested for a sale of narcotics in Queens (A272-A274).

On cross examination Ferrarone admitted that Angiolillo told him that as to the February sale, Rizzieri went to Long Island for the supply (A275). Ferrarone admitted that one Donovan told him that Rizzieri and Jimmy Cimino and Eddie Castellano, also supplied him with drugs as well as the Riccos (A276-A278).

On March 13, 1973, the night before Rizzieri's arrest, Rizzieri responded to the witness' complaint about the

quality of the narcotics Rizzieri was supplying him with. Rizzieri told him the source was "drying up" or "dried up" (A278). Further, Rizzieri told the agent that he had to go to other sources, that he had to go to Long Island for supplies (A278, A279).

Gary Pearson, also testified (A280). He met the co-defendant John DiSalvo in 1969 and became friendly with him in December of 1971 (A281, A282). In April 1973 he accompanied DiSalvo and two others named Roy and Larry to New Jersey to make a sale to others (A282, A283). In New Jersey at the appointed spot, DiSalvo became suspicious and left the immediate area (A284, A285). In May 1973 Pearson met DiSalvo, who was accompanied by one Jerry Rubin. Rubin spoke to DiSalvo but the witness didn't hear the conversation (A287). However following that conversation DiSalvo told Pearson that Rubin wanted DiSalvo to supply him with an eight of a kilo of heroin (A288). DiSalvo told the witness that he could supply it (A288). Ultimately a sale was made to Rubin by this witness who gave it to Rubin (A290). A few weeks later DiSalvo told Pearson that he made another sale to Rubin giving Pearson a payment (A290, A291). Later this witness met Peter Mengrone (an unindicted co-conspirator) in Mount Vernon, the time being May 1973 (A291, A292). Mengrone asked Pearson for a supply of cocaine (A292). Pearson told this to DiSalvo (A293). This time DiSalvo said he would see whether Rubin would supply it (A293). Upon meeting Rubin the quantity to be acquired and the price were discussed (A297, A298). Pearson related these terms to Mengrone (A298). Later Pearson and DiSalvo went to the "Magic Carpet" (A298). At that place the witness left DiSalvo at the bar and spoke to Mengrone privately (A298). He asked Mengrone whether he had the price and Mengrone told him he was waiting for the money (A299).

The witness related this to DiSalvo (A300). It next developed that the money was never given to Mengrone. It appeared that one "Nick" was with Rubin, who it will be recalled was the supplier in this transaction. As the witness described it, Mengrone was to give the witness the money to bring to Rubin who in turn was to give the money to Nick, who was to give it to Mengrone. This was described as a "circular" transaction (A300). This witness dissolved his relationship with DiSalvo in June 1973 (A301). Later he received a shipment of cocaine from Florida in September 1973 (A301). He spoke to Angelo Ricco at Renzo's and gave him a sample (A302, A303). He attempted to sell this cocaine to Ricco but failed (A303).

In October 1973 Pearson met one Louis Guerra who wanted to buy an eight of a kilo of heroin from him (A304, A305). Pearson spoke to DiSalvo about this transaction (A305). He gave DiSalvo a down payment and ultimately procured the narcotics (A307). He gave a portion of these narcotics to Louis Guerra and another person (A307).

An agent named Gerbino next testified for the Government (A309). His testimony reached the visit to New Jersey by DiSalvo and Pearson who previously testified (A310-A313). There he met one DeJesus and another person. This agent told them that he had $36,500 to make a purchase of narcotics (A312). DeJesus being apprehensive moved the site of the proposed transaction to another place, a restaurant (A313). On this occasion, Gerbino saw DiSalvo in the area, who was observing him (A314). DeJesus also displayed a gun to this witness telling him that it was necessary for the "business" (A314). Later two men came to the scene of the meeting, a diner (A315). One of the men named "John" joined this witness and the others and said he was the "boss" (A316). Gerbino identified "John" as DiSalvo (A316, A317). DiSalvo threatened to kill Gerbino

if it were ascertained he was an agent. This occurred on Good Friday (A318). Nevertheless the transaction was aborted because DiSalvo was apprehensive (A319, A320). Instead they later met in the Bronx, pursuant to an arrangement (A319, A320). In the Bronx, DiSalvo told the agent that he was ready to do business and to supply as much narcotics as the witness wanted (A320).

Peter Mengrone next testified for the Government (A324). This witness' background consisted of a college degree, government service, service for other government agencies, and a two year attendance at a law school (A324, A326). In April 1974 Mengrone pled guilty in a New York State Court to a narcotic offense (A326). He was arrested on the charges involved in this indictment October 25, 1973. He began his cooperation with the authorities October 1974 (A327). For the period of October 1971 to September 1972 he worked at a bar called the "Four Winds" (A328). He then identified Angelo Ricco, Rizzieri, DiSalvo and the petitioner at the trial (A328, A330). He knew Anthony Ricco (A332). While working at the Four Winds he often saw Rossi and Angelo Ricco (A332, A333). However while working there he didn't know the petitioner INDIVIGLIA (A335). After leaving the Four Winds he bought the "Magic Carpet", a lounge in the Bronx (A336). He simultaneously worked at Empire Ford, a Ford dealer (A337). He operated the Magic Carpet from September 1972 to June 1973 (A337). Anthony Ricco patronized that bar and came there with the petitioner two or three times weekly (A338, A339). Rossi and Rizzieri also frequently came to that bar (A340). There they met Angelo Ricco and the petitioner. Anthony Ricco also came there (A341).

On occasion he saw them go to the bathroom at that bar (A342). However he heard no conversations between them (A343). Rossi finally stopped attending (A344). However

Rizzieri continued to patronize the bar meeting the Riccos and the petitioner there (A344). Later Angelo Ricco and a Ricky Baronti invested $8,000 in the bar (A345, A346). After Rizzieri was arrested the petitioner and the Riccos did not go to the bar (A345).

However business declined at the bar and Mengrone told Anthony Ricco that he couldn't pay the debt he owed (A353). Thereupon he offered to sell narcotics for Ricco (A353, A354). He then let it be known to others that he was in the position to sell narcotics (A354). In June 1973 he spoke to Pearson, one Anthony Zinzi, Nick Visciglia, and Frank Lucas about narcotic sales (A355).

Pearson offered to be a supplier (A355, A356).

In June 1973 Pearson told Mengrone that he could supply heroin and cocaine to him (A356). Then Visciglia told him that he had a customer (A356). Mengrone met with Anthony Ricco and told him of the Pearson and Visciglia proposal (A358, A359). According to Mengrone, Anthony Ricco entered into an arrangement whereby Visciglia would get adulterated cocaine and the proceeds of that sale would be used to buy narcotics from Pearson (A359). Thereafter Mengrone told Pearson he would make a purchase from him (A357, A358). He then told Visciglia he would give him a sample at the "Magic Carpet" (A358). There the witness met Anthony Ricco who told him to go to his brother Angelo to get a sample. He did so (A358, A359). Visciglia approved the sample and told Mengrone that he was then going to get the purchase price (A361).

Pearson and DiSalvo next met him to receive the purchase price (A361, A362). Eventually the transaction fell through (A362).

It appeared that Visciglia didn't complete the transfer because Pearson ultimately was to sell the very narcotics to

Mengrone and Ricco. This was characterized as a "double jerk" (A364).

Later this witness met a James Veniz, a usurer in July 1973 (A364). Venia had a supply of six kilos of heroin that he wanted to sell for $40,000 (A365). Mengrone met the Riccos, explained the proposal, but was told to buy that quantity at $35,000 (A366). Venia, when told of this, agreed to the price (A366). Mengrone then got $35,000 from Angelo Ricco, kept $2,000 of it for himself and gave Venio the net balance of $33,000 (A368). Venia told Mengrone to wait for the delivery of the narcotics (A369). When the Riccos were told of this they criticized him for not getting the narcotics when he made the payment to Venia (A370, A372). The witness told Anthony Ricco then about kidnapping a child of Veniz in order to get the money, but Anthony Ricco disapproved (A372).

Mengrone then related of an aborted deal with a Frank Lucas. This transaction fell through because Anthony Ricco wanted no deliveries to be made in Harlem (A375, A376).

Seeking to give evidentiary support to overt act number 21, alleged in the conspiracy count of the indictment, it was elicited that Mengrone was attempting to deal with Lucas. In the early part of October 1973 Mengrone was to give a sample of the narcotics to Lucas (A377). The witness waited in his automobile in front of the "Magic Carpet" for Anthony Ricco to give him the sample (A377). The petitioner emerged from the bar and greeted him, the witness telling the petitioner that he was waiting for Anthony Ricco, that he had a "big deal" (A378). The petitioner told Mengrone that he was also waiting for "Tony", that he had something big, and that he, the petitioner, was in the "middle of a big deal" and that he needed the sample (A378).

The petitioner then re-entered the bar (A378). Meanwhile a nephew of Anthony Ricco named "Sally" appeared and told the witness that he had two customers (A378, A379).

Ultimately Anthony Ricco appeared and gave Mengrone the sample to be delivered to Lucas, telling Mengrone to tell Lucas to deal directly with him (A379, A380). The petitioner appeared and announced to Anthony Ricco that he was present and Anthony Ricco left the witness and went into the bar with the petitioner (A379).

REASONS FOR GRANTING THE WRIT:

POINT I

THERE WAS A FATAL VARIANCE BETWEEN THE PROOF AND THE COUNT CHARGING AN OVERALL CONSPIRACY

The Fifth Amendment to the Federal Constitution provides that one cannot be held for a felony unless a grand jury so charges or indicts. The petitioner now contends that the conspiracy count charged an overall conspiracy, but the proof showed more than one conspiracy.

There were ten (10) defendants and three (3) unindicted co-conspirators who were named, coupled with other co-conspirators unknown to the grand jury. In order to arrive at a solution of the problem involved, it is necessary to sift the evidence and explore the same to see whether there are threads connecting the defendants. The separate conspiracies involved here extended to Rizzieri, who allegedly continued the narcotic business after Rossi stopped dealing with the Ricco brothers as well as Rizzieri. Yet Ferrarone, the agent who testified in support of the government's case, told the jury that Rizzieri told him that the sources died out

(this would be the Riccos) or that he had difficulties with his sources and therefore dealt with others.

Pearson who was dealing with DiSalvo testified that "Rubin" may have been a supplier to DiSalvo and Pearson.

The petitioner's role, if he had one, was at a minimum. To put the petitioner on trial with the others involving lurid transactions, such as Mengrone threatening to kidnap the child of a defaulting buyer, with Rossi cheating Lucas, with DiSalvo making threats to agents who were incognito at the New Jersey affair, and an attendant at this meeting displaying a weapon, with DiSalvo threatening violence to a denied agent, deprived the petitioner of a fair trial and due process of law under the Fifth Amendment to the Federal Constitution. We also mention the fact that in the count charging conspiracy overt act number 21 alleged that in September 1973 the petitioner purchased a quarter of a kilogram of heroin from Anthony Ricco. The government itself theorized that petitioner was a purchaser and the Ricco's were the sellers.

Furthermore, there is the sordidness usually attendant to a criminal action involving heroin and narcotic transactions. Finally, there is a conceptual complexity presented to the jury in proof of a conspiracy.

As was recently held in *Anderson v. U.S.*, 417 U.S. 211, (1974) at page 224:

> ". . . Moreover, we scrutinize the record for evidence of such intent with, special care in a conspiracy case for, as we have indicated in a related context, charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . the dragnet to draw in all substantive crimes . . ." (Omitting internal citations and quotations).

As noted in the slip opinion of the Court below (see Appendix, infra) at page 6167:

> ". . . Indiviglia appears to claim prejudicial misjoinder based on what he described as his minimal involvement in most of the narcotics transactions proven. This claim too is without merit. The evidence established that he was routinely present at the sales of heroin and cocaine involving . . . and that on occasion he himself delivered the narcotics and negotiated the prices . . ."

It is respectfully submitted that the fact that the petitioner was "routinely present" when heroin was being transacted, does not make him a conspirator. A conspiracy is not a group of people. See *U.S. v. DiRe*, 332 U.S. 581 (1947) at page 593, this Court stating that mere presence at the scene of a crime may be insufficient proof that a person participated in the crime.

Furthermore, as this Court stated in *Direct Sales v. U.S.*, 319 U.S. 703 (1942) at page 712, footnote 8:

> ". . . This may be true, for instance of a single or casual transactions not amounting to a course of business regular, sustained and prolonged, and involving nothing more than the seller's part and indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase for whatever end. A considerable degree of carelessness coupled with casual transactions is . . . outside, the boundary of conspiracy . . ."

But in this case, the jury was not confronted with merely a few isolated acts on the part of Indiviglia and his presence with the participants in the criminal enterprise, but all the hearsay and sordidness surrounding all the narcotic transactions.

The fact that others were involved and that the petitioner was deemed to know of the presence of the others did not make him a "conspirator."

As was stated in 72 Harvard Law Review, at page 922, et seq. "Developments in the Law of Criminal Conspiracy" (1959) at page 928:

> "Courts generally consider that a person who joins in an existing criminal group becomes a party to the same conspiracy. But if a conspiracy consists of a continuing act of agreement, it is difficult to see how that can be so, since the act of agreement in which an individual participates can not logically begin before he enters or continues after he leaves. In reaching their conclusion therefore, Courts seem to be using the word conspiracy to refer not to a crime which by definition must be an act, but rather to a group . . ."

That a conspiracy is an agreement, was recently held by this Court in *U.S. v. Feola*, 420 U.S. 671 (1975) at page 687, this Court stating that:

> ". . . , a conspiracy to commit that offense is nothing more than an agreement to engage in the prohibative conduct . . ."

It is also suggested that commercial concepts have been imported into the case law serving as a basis for conspiracy prosecutions. However the crime of conspiracy carries a penal consequence. Commercial agreement usually involve monetary considerations. In other words, liberty is not involved in commercial transactions such as partnership, contract and agency.

As noted by this Court in *Brewer v. Williams*, No. 74-1263, 45 U.S. Law Week, page 4287 (March 23, 1977), footnote 8, at page 4291:

". . . But we deal here not with notions of offer, acceptance, consideration, or other concepts of the law of contracts . . ."

As was stated in "The Unnecessary Crime of Conspiracy", 61 California Law Review, September 1973, page 1137, et seq., on pages 1148 and 1149:

". . . Model Penal Code. Defines conspiracy in terms of one person agreeing with another, rather than two or more persons entering into an agreement. This semantic change was intended among other things, to make it possible to find each of the members of a criminal enterprise guilty of a different conspiracy, depending upon what he individually agreed to . . ."

On page 1150 of that article it was stated that:

". . . A far better way to determine the scope of one's individual liability for the conduct of another would be to abandon conspiracy altogether with its notions of business enterprises and general partnerships, and look instead to the policy underlying the specific prohibitions at issue . . ."

". . . But these elementary propositions of business economics have nothing to do with the criminal culpability. Absent the confusing concepts that conspiracy introduces, the courts probably would not even consider holding each participant for the crimes of the entire enterprise."

As may be recognized, this type of problem dealing with conspiracy has been graphically illustrated as a chain conspiracy, each link being a component part and therefore an overall conspiracy, and a "spoke" conspiracy, the various spokes constituting separate agreements with

the nucleus. It appears there is now a third graphic illustration known as the "Fork" conspiracy. See Volume XLII Brooklyn Law Review, 4/19/75, Volume No. 2: "Resolution of the Multiple Conspiracys Via a 'Nature of the Enterprise' Analysis: The Ressurection of Agreement", on page 275 where it was stated in part that:

". . . Practically speaking, the single chain is not an accurate schematic representation of modern conspiracies. In addition to the various divisions of labor indicated along the single vertical chain, most conspiracies include many persons simultaneously operating at the same functional level. Whereas in a theoretical single chain each person who performs a specific role may be visualized as a link in the chain, where two or more persons act in the same capacity this horizontal division of labor may be viewed as creating splits in the chain from which two or more forks emanate."

On pages 297-298 it was stated in part that:

". . . at its most sophisticated stage, the modern conspiracy, often involving the distribution of narcotics, is characterized by many persons operating on various functional levels who participate in a chain of distribution over a substantial period of time. . . . That analysis revealed that in some cases from a point of view of each participant, there is in fact a single conspiracy. In other cases, from the point of view of the core members, there was a single conspiracy, but the involvement of certain other members was not coextensive with that of the core. Thus was added the caveat that, in those cases, . . . , in some instances, severance must be employed to insure that

each defendant's guilt be premises upon the actual scope of his individual agreement."

It is suggested that the petitioner if he is held to the conspiracy was at the periphery of it and was shown, at most, to have engaged in peripheral conduct. His relationship was at most tangential.

One of the co-conspirators was named Blase. When he moved for a judgment of acquittal, such motion was denied but the trial court did give him some relief for it directed a severance of the case against him and directed a re-trial. In severing the case as to Blase, it is believed that the Court held that while Blase operated with Rossi in the initial phase of the "conspiracy" the evidence of the subsequent events would have impaired his right to a fair trial. Yet the Court allowed the case to go to the jury as to the petitioner. As argued above, the case against the petitioner was Rossi's very testimony. Thus Rossi thought the petitioner was present at a meeting with the Riccos; his testimony revealed that he "found out" that certain narcotics belonged to petitioner. Furthermore, he never "fully" transacted with petitioner. When he was confronted by statements he apparently gave to the authorities, when he was cooperating, he didn't recollect referring to petitioner.

Joinder of defendants in one indictment followed by a single trial is governed by Rules 8 and 14 of the Rules of Criminal Procedure. Coupled with that is prosecutorial discretion subject only to limitations found in Rules 8 and 14 of the Rules of Criminal Procedure and the due process clause of the Fifth Amendment to the Federal Constitution. This practically untrammeled discretion of a prosecutor in framing an indictment as the one before this Court, allows the prosecutor to present to the trial jury such massive detail that individual jury consideration of an individual defendant's innocence is all but impaired. Furthermore, it

has been held that juries may not be able to follow instructions. See *Bruton v. U.S.*, 391 U.S. 123 (1968). The issue in this case as well as in other conspiracy cases, has arisen and arises because of the loosely controlled discretion enjoyed by a prosecutor subject to Court control usually after a conviction has been obtained. See No. 13 "The American Criminal Law Review (Winter 1976) A Symposium—Prosecutorial Discretion" at pages 490 et seq. On page 490 it was stated that:

> "As attention has focused on the decision making power of the prosecutor a once almost solitary plea for controls has grown into substantial support for the administrative law to regulate pre-trial prosecutorial procedures . . ."

The failure of the trial court to direct a severance in petitioner's case at the very least as it did in Blase's case, affected the consideration of the defendant's liability on the substantive count, count 2 of the indictment. This count rested on Rossi's testimony. The jury heard that Rossi who had numerous interviews with the government authorities, couldn't recall those interviews. The thrust of the questioning in this regard was that Rossi did not even refer to petitioner. Rossi even stated before trial that prior to January 1973 he didn't deal in narcotics or cocaine. The second count joining petitioner with Angelo Ricco referred to a transaction in August 1972.

This Court is respectfully importuned to deduct all the other hearsay, unrelated transactions involving the defendants, the named co-conspirators but unindicted, and the others from the record and consider the case against petitioner so isolated. The residue consist of two main witnesses against petitioner namely Rossi and Mengrone. Rossi's background, career, inconsistent

statements, pre-trial silence, have all been considered. The only other evidence against the petitioner involved the testimony of Mengrone who testified in support of an overt act of the conspiracy count. Yet Mengrone's testimony did not support the allegation.

It is respectfully submitted that petitioner's defense would have been more effective in presenting all the issues before the jury if he were tried separately and not subjected to all the details this trial involved. The petitioner's argument is based on the fact that the Court apparently was motivated to severe Mr. Blase because his role was at a minimum. It is difficult to see how petitioner's role was different from Blase's role. That the Court by not according the same relief to petitioner as it did to Blase, it is submitted, denied petitioner equal protection of the law. It is put that equal protection of the law is a concept embodied in the due process clause of the Fifth Amendment to the Federal Constitution. See *Bolling v. Sharpe*, 340 U.S. 497. Furthermore in *U.S. v. Papadakis*, 510 F. 2d 287, 300 (Cir. 2d, 1975), at page 300 it was held that during trial the Court can direct a severance if there is prejudice in a trial.

POINT II

THE SUMMATION BY THE GOVERNMENT ATTORNEY EXCEEDED THE BOUNDS OF FAIR COMMENT.

The rebuttal of the last closing argument of the government attorney referred to the remuneration the government witnesses were getting. He told the jury in part that:

> "We say . . . that they couldn't have gotten the money from their old associates any longer,

> somebody has to support these people while they are doing this work. . . . We will do it because we need the testimony because they are the people who know, and that's why we do it; otherwise we couldn't put these cases together."
>
> "I submit that every penny we spent on Rizzo and on Pearson is worth it . . ." (A419).

Timely objection was taken and sustained.

While the Court thus sustained the objection the jury heard this remark. In these inflationary times, with high taxes and the like, the impact of this remark to the jury was ineradicable. This statement to the jury in the context of this case, namely the details of the crime, the numerous parties, the duration of the trial, the lurid incidents, and all the sordid circumstances rendered this trial unfair to the petitioner. A narcotic case, it is suggested, is not just an ordinary criminal case. It carries with it to the jury the sense of a heinous crime. However the enormity of the crime only presented a challenge to the standard of fairness that must be accorded a defendant in any criminal action. It is further put that the more grotesque the evidentiary details of a crime, the more is required from a prosecutor to cooperate with the Court to insure an absolutely fair trial to an accused.

The lay jury was less impressed by the prosecutor with the cost of this prosecution incurred by the Government. The plain meaning of the prosecutor's summation was that the Government should receive a consideration or a return on its investment in this case, namely a conviction. In *U.S. v. Burse*, 531 F. 2d 1151 (Cir. 2d 1976) at page 1154, it was stated in part that:

> "This Court has repeatedly addressed itself to the problem of prosecutorial misbehavior in the form

> of inflammatory or insinuating questions and statements . . . We have consistently warned that such misconduct may constitute sufficient cause for reversal." (Internal citations omitted).

See also *Berger v. U.S.*, 295 U.S. 78 (1935).

In *U.S. v. Ludwig*, 508 F. 2d 140, 143 (Cir. 10th, 1974), it was held that it was unfair to a defendant in a criminal action where the prosecutor commented on the credibility of the Government witnesses.

In *Donnelly v. DiChristoforo*, 416 U.S. 637 (1974) this Court dealt with a state conviction where it was contended the state prosecutor summed up unfairly and therefore tainted the conviction. While this Court that no constitutional issue was presented for review, the prevailing opinion in this Court in footnote 23 on page 648 did state:

> ". . . We do not by this decision, in any way condone prosecutorial misconduct, and we believe that trial courts by admonition and instruction, and appellate courts, by proper exercise of their supervisory power, will continue to discourage it."

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT A PETITION OF CERTIORARI BE GRANTED.

Respectfully submitted,

ARNOLD E. WALLACH
A Member of the Bar of the United States Supreme Court

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1316, 1333, 1334—September Term, 1975.

(Argued August 19, 1976 Decided February 7, 1977.)

Docket Nos. 76-1129, 76-1152, 76-1191

UNITED STATES OF AMERICA,

Appellee,

v.

ANGELO RICCO, JAMES RIZZIERI, and
CHARLES INDIVIGLIA, a/k/a "Charlie Poops",

Defendants-Appellants.

Before:

VAN GRAAFEILAND, *Circuit Judge,*
KELLEHER* and GAGLIARDI,** *District Judges*

Appeals from judgments of the United States District Court of the Southern District of New York, after jury trial before Hon. Morris Lasker convicting appellants of conspiring to violate the federal narcotics law and of substantive narcotics violations, in violation of 21 U.S.C. §§846, 812, 841(a)(1), and 841(b)(1)(A).

Affirmed.

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* Of The Central District of California, sitting by designation.

** Of The Southern District of New York, sitting by designation.

J. JEFFREY WEISENFELD, GOLDBERGER, FELDMAN & BREITBART, New York, N.Y., on the brief, *for Appellant Ricco.*

HOWARD L. JACOBS, New York, N.Y. (Donald E. Nawi, on the brief), *for Appellant Rizzieri.*

ARNOLD E. WALLACH, New York, N.Y., *for Appellant Indiviglia.*

ROBERT E. FISKE, JR., United States Attorney, Southern District of New York (Dominic F. Amorosa, Jerry L. Siegel, and Jeffrey Glekel, Assistant United States Attorneys, of Counsel), *for Appellee.*

GAGLIARDI, *District Judge:*

Angelo Ricco, James Rizzieri, and Charles Indiviglia appeal from judgments of conviction entered in the United States District Court for the Southern District of New York following a three week jury trial before Judge Morris E. Lasker. Each appellant was convicted of conspiring to distribute narcotics, 21 U.S.C. § 846, and of distributing, and possessing with intent to distribute, narcotics, 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(A).[1] The principal claim of error raised on this appeal is the not unfamiliar argument that the evidence introduced at trial varied

1 Appellants and nine others were originally charged in the indictment. Prior to trial six of the co-defendants were severed, and appellants were tried together with the remaining three, one of whom, Freddie Blase, was severed during the trial. The jury returned guilty verdicts against all five remaining defendants on Count One, the conspiracy count. In addition, the appellants and John DiSalvo were found guilty on all substantive counts in which each was charged. The fifth defendant, George Corrado, was acquitted of the single substantive charge against him. Corrado has not appealed his conspiracy conviction, and DiSalvo has withdrawn his appeal.

from the indictment by establishing multiple conspiracies rather than the single one charged. Appellants also contend that the prosecutor's comments in summation denied them a fair trial. Additionally, Rizzieri raises claims of prejudicial pre-trial delay and double jeopardy, and Ricco contends his motion for severance was improperly denied. For the reasons which follow, we find each of these contentions to be without merit and, accordingly, affirm the judgments of conviction.

The proof at trial revealed the existence of a relatively uncomplicated conspiracy composed of two or three suppliers who regularly sold large quantities of heroin and cocaine to intermediate distributors, each of whom in turn provided smaller amounts with equal regularity to more numerous retailers or customers. For much of its case the government relied on the testimony of a number of unindicted co-conspirators, including Albert Rossi and Peter Mengrone.[2] In brief outline, the testimony, which was corroborated by other evidence, established that appellant Angelo Ricco and his uncle, Anthony Ricco, also known as Toney Bragiole ("Bragiole"),[3] headed the conspiracy and were its source of narcotics. Ricco and Bragiole (jointly referred to as "the Riccos"), acting with the assistance of appellant Indiviglia, supplied heroin and cocaine on a regular and extensive basis to Rossi, appellant Rizzieri, co-defendant Blase, and Mengrone, who in turn diluted and distributed the narcotics to co-defendants Corrado and DiSalvo, and additional customers. Numerous other co-conspirators participated both as distributors of the drugs and as ultimate retail customers.

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2 Rossi and Mengrone pleaded guilty to related federal and state narcotics charges prior to trial.

3 Bragiole, indicted on the conspiracy count and four substantive counts, was among the defendants severed prior to trial.

Multiple Conspiracies Claim

Appellants contend that, although the indictment charged them with participation in one ongoing conspiracy lasting from 1971 until 1973, the government at trial established the existence of several independent conspiracies. It is argued that the evidence demonstrated that Blase, Rossi, Rizzieri and Mengrone, conducted totally independent distribution operations, drew on drug sources in addition to the Riccos, distributed narcotics for the Riccos during successive and unconnected periods of time, and dealt individually and separately with the Riccos without any conspiratorial connection among themselves on the same distributional level. This variance between indictment and proof, they contend, was fatally prejudicial. *See Kotteakos* v. *United States*, 328 U.S. 750 (1946).

In assessing these claims we must bear in mind that the question of whether the evidence has established the single conspiracy charged in the indictment is primarily a factual issue to be determined by the jury. *United States* v. *Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976). Therefore our review of the proof, which is to be considered in the light most favorable to the government, *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972); *United States* v. *Kahaner*, 317 F.2d 459, 467 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963), is undertaken only to determine whether the evidence is sufficient to sustain the jury's finding of a single conspiracy. *United States* v. *Calabro*, 449 F.2d 885, 893 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972); *Dardi* v. *United States*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). From the evidence adduced at trial and set forth below the jury could properly have found as follows.

The conspiracy commenced in October or November of 1971, when Rossi and Blase began purchasing sizeable

quantities of heroin from the Riccos. The deliveries of the narcotics were made personally by Ricco or Bragiole, who were routinely accompanied by Indiviglia. By July, 1972 Rossi and Blase had made eighteen such purchases of heroin from the Riccos and had received $20,000 from their resales to numerous narcotics customers.

In July, 1972 Rizzieri began working with Rossi in place of Blase, who was effectively phased out of the conspiracy. Ricco and Bragiole, upon being informed by Rossi of this personnel substitution, met with Rossi and Rizzieri and expressly agreed to continue supplying heroin to what was now the Rossi-Rizzieri distribution partnership. From July until December, 1972 Rossi and Rizzieri received forty to fifty deliveries of very high quality heroin from the Riccos in amounts ranging from an eighth of a kilogram to two kilograms. The Riccos continued their practice of delivering the narcotics personally, accompanied by Indiviglia. Rossi and Rizzieri diluted the heroin to "commercial" purity, and resold it to their customers. These resales occurred on approximately sixty occasions, involved quantities ranging from an eighth of a kilogram to one kilogram, and generated at least $200,000 during the latter half of 1972.

Another change in the conspiracy's membership occurred in January, 1973. Following a dispute over responsibility for a failed attempt to resell two kilograms of heroin, Rossi abruptly withdrew from his distributing relationships with the Riccos and with Rizzieri. Rizzieri continued to function as a distributor of the Riccos' heroin and cocaine until he was arrested on March 14, 1973 after selling one quarter kilogram of heroin obtained from Bragiole to an undercover agent.

The final phase of the conspiracy involved Mengrone's participation as a distributor of the narcotics. Mengrone originally owned and operated the Magic Carpet, a bar

and restaurant in the Bronx in which he had observed the Riccos, Indiviglia, Rossi and Rizzieri meet several times a week and engage in secretive discussions during the period from September, 1972 through June, 1973. Following Rizzieri's arrest in March, 1973, Mengrone delivered a message to the Riccos, sent through Rizzieri's girlfriend, to the effect that Rizzieri was "going to stand up and do the time and that nobody had to worry, and . . . he . . . [would] not implicate anybody." Two months later Mengrone asked the Riccos to allow him to distribute narcotics for them. They consented and until his arrest in October, 1973 Mengrone actively solicited customers and participated in numerous attempted transactions.

Although each of the appellants claims to have been substantially prejudiced by proof of separate conspiracies,[4] Rizzieri's claim raises the only serious question, and we turn to it first. He contends that many of the so-called "Ricco distributors" were independent drug dealers in their own right, operating with sources and outlets for narcotics outside the Ricco organization. However, if the single conspiracy charged in the indictment is proved, the fact that there was also evidence relating to another conspiracy does not require reversal. *United States* v. *Tramunti*, 513 F.2d 1087, 1107-08 and n. 26 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). Thus the admission of evidence showing that Rizzieri and the others may have engaged in narcotics transactions in addition to those involving the Riccos does not establish multiple conspiracies. *United States* v. *Tramunti, supra.*

Rizzieri also claims that the activities of the various distributors constituted "spokes" in the conspiracy entirely separate from his own participation, *see Kotteakos, supra,*

4 No objection was taken to the trial court's charge to the jury on the issue of multiple conspiracies, nor is the charge challenged on this appeal.

and that he was prejudiced by the admission of evidence relating only to those allegedly separate conspiracies.

In considering this claim, we note initially that there was considerable evidence establishing both vertical and horizontal interlocking among the conspirators. The distribution of drugs by Rossi and Blase as partners, then Rossi and Rizzieri as partners, then Rizzieri alone, and finally Mengrone was based in each instance on express agreements and personal transactions with the Riccos and resulted in eventual retail sales to a market composed of many of the same buyers throughout the duration of the conspiracy. Furthermore, Rizzieri engaged in a fruitful partnership buying and selling the Riccos' narcotics with Rossi, who had previously maintained the same distribution arrangement with Blase. Blase was present when Rizzieri and Rossi were introduced to each other and they first discussed plans for joint dealings in drugs. Later Blase accompanied them on one occasion when they picked up heroin from Ricco.

Rizzieri's only substantial *Kottcakos* claim concerns the Mengrone distribution. Peter Mengrone did not begin to distribute narcotics for the Riccos until May of 1973, two months after Rizzieri's arrest. Prior to Rizzieri's arrest Mengrone had not realized that the Riccos and their associates were involved in narcotics transactions, although as owner of the Magic Carpet he had observed various combinations of the conspirators meet privately in his establishment, and he had transmitted the message after Rizzieri's arrest to the effect that Rizzieri would "not implicate anybody".

We have often held that one who deals in sizeable quantities of narcotics may be presumed to know that he is participating in an organization which extends beyond his individual involvement. *United States* v. *Magnano*, 543

F.2d 431, 434 (2d Cir. 1973); *United States* v. *Leong*, 536 F.2d 993, 995-96 (2d Cir. 1976); *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Mallah*, 503 F.2d 971, 983-84 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975).

Whether this inference may be drawn, however, depends on the nature of the enterprise and the participant's involvement. *United States* v. *Miley*, 513 F.2d 1191, 1207 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975); *United States* v. *Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

Although we are satisfied that the activities of Blase, Rossi and Rizzieri with the Riccos and Indiviglia constituted a single conspiracy, the question of whether Mengrone's distributing activities are properly to be included in that conspiracy is not as easily disposed of, for Mengrone did not begin working for the Riccos until May of 1973, two months after Rizzieri had been arrested and incarcerated and five months after Rossi had withdrawn. *Cf. United States* v. *Lam*, Dkt Nos. 75-1435, 75-1440, 76-1005 (2d Cir. Sept. 27, 1976), slip opin. 5725, 5736-38; *United States* v. *Miley, supra*, 513 F.2d at 1207.

However, we need not decide this issue of whether the evidence supported a finding of a single conspiracy, for even if Mengrone's dealings with the Riccos did constitute a second conspiracy, we would nevertheless find no reversible error. As we have recently explained,

> Where the indictment charges one conspiracy but the proof shows more than one, a variance is not necessarily fatal. "The true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States*, 295 U.S. 78, 82, 55 S. Ct. 629, 630, 79 L.Ed. 1314 (1935).

United States v. *Miley, supra*, 513 F.2d at 1207. *See United States* v. *Vega*, 458 F.2d 1234, 1236 (2d Cir. 1972), *cert. denied*, 410 U.S. 982 (1973); Rule 52(a), Fed. R. Crim. P.

We are satisfied that any variance from the indictment's charge of a single conspiracy which might have been caused by proof of Mengrone's drug-related activities, which did not commence until May, 1973 and which occurred while Rizzieri was incarcerated following his arrest in March, did not prejudice Rizzieri. Extensive, detailed and highly incriminating testimony was provided by Rossi relating to the numerous narcotics transactions in which Rizzieri was involved prior to his arrest. Rizzieri makes no claim that incriminating out-of-court statements made by individuals with whom Mengrone conspired after May, 1973 were admitted into evidence on the theory that all were members of a single conspiracy. *See* Rule 801(d) (2) (E), Fed. R. Evid.; *United States* v. *Lam*, *supra*, slip opin. at 5738; *cf. United States* v. *Miley*, *supra*, 513 F.2d at 1208. Furthermore, the district judge did not charge the jury that, under the rule of *Pinkerton* v. *United States*, 328 U.S. 640 (1946) it could convict Rizzieri of a substantive offense committed by Mengrone or any of the individuals with whom he conspired after May, 1973. *See United States* v. *Lam*, *supra*, slip opin. at 5738; *cf. United States* v. *Miley*, *supra*, 513 F.2d at 1208-09; *United States* v. *Sperling*, 506 F.2d 1323, 1341-42 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

Nor can Rizzieri successfully claim that he was the victim of a "spillover effect" by which the evidence relating to Mengrone's activities tainted the jury's consideration of Rizzieri's own individual criminal responsibility. We have previously indicated that in considering such a claim of spillover guilt transference it is instructive to "determine whether the number of conspiracies proven and conspira-

tors tried was so large as to make it difficult for the jury to weigh the evidence against each defendant carefully and intelligently." *United States* v. *Lam, supra,* slip opin. at 5738. In the case before us twelve defendants were originally indicted, and the charges against only five were ultimately submitted to the jury. There were only three unindicted co-conspirators, and at most two conspiracies were proven. Abundant evidence independent of the Mengrone transactions established that Rizzieri was a major distributor of narcotics for the Riccos. This analysis of the relatively uncomplicated nature of the case presented at trial leads us to the firm conclusion that neither the scale of the prosecution nor Rizzieri's status among the conspirators was such as to impair the jury's ability to consider his individual responsibility based on "intelligent differentiation" among defendants.[5] *United States* v. *Lam, supra,* slip opin. at 5739; *United States* v. *Magnano, supra,* 543 F.2d at 435 n. 2; *United States* v. *Toliver,* 541 F.2d 958, 963 (2d Cir. 1976); *United States* v. *Miley, supra,* 513 F.2d at 1209. *Cf. United States* v. *Kotteakos, supra,* 328 U.S. at 774; *United States* v. *Bertolotti,* 529 F.2d 149, 156-57 (2d Cir. 1975). Furthermore, although the drug deals to which Mengrone testified did include incidents of threatened violence, they consisted essentially of the same kinds of transactions Rizzieri had conducted and there was absent the voluminous "shocking and inflammatory" testimony of entirely unrelated criminal ventures which was found to be prejudicial in *Bertolotti, supra.*

Ricco and Indiviglia assert other claims concerning proof of multiple conspiracies, none of which are persuasive. The evidence was sufficient to establish that each was closely involved in all phases of the activities charged and

5 An indication of the jury's ability to distinguish among defendants and assess individual culpability is its acquittal of Corrado on the one substantive count in which he was named.

proven. Ricco's contention that he was entirely uninvolved in three transactions between Rizzieri and an undercover agent which culminated in Rizzieri's arrest in March of 1973 must be dismissed, for the testimony of that agent permitted the jury properly to conclude that the Riccos had supplied the drugs involved on those occasions.[6] Indiviglia appears to claim prejudicial misjoinder based on what he describes as his minimal involvement in most of the narcotics transactions proven. This claim too is without merit. The evidence established that he was routinely present at the sales of heroin and cocaine involving the Riccos, Rossi, Blase, Rizzieri and Mengrone, and that on occasion he himself delivered the narcotics and negotiated prices. The joinder requirements of Rule 8, Fed. R. Crim. P., are met if the defendants "are alleged to have participated in the same series of acts which are part of a common scheme or plan." *United States* v. *Bernstein,* 533 F.2d 775, 789 (2d Cir. 1976); *see United States* v. *Sir Kue Chin,* 534 F.2d 1032, 1035 (2d Cir. 1976); *United States* v. *Borelli,* 336 F.2d 376, 387 (2d Cir. 1964), *cert. denied,* 379 U.S. 960 (1965). The proof establishing Indiviglia's intimate connection with the drug deliveries is more than sufficient to satisfy these requirements.

Pre-trial Delay and Double Jeopardy

Rizzieri's claim of prejudicial pre-trial delay and double jeopardy are based on the circumstances surrounding the heroin sale for which he was charged in Count Four of the indictment. Because these circumstances and their consequences are also relevant to Ricco's severance claim, discussed below, we will set them forth in some detail.

6 The circumstances of Rizzieri's arrest and of two prior transactions between Rizzieri and the arresting undercover agent are presented more fully below, under the discussion of Rizzieri's claims of prejudicial pre-trial delay and double jeopardy.

In addition to being named in the conspiracy count of the indictment, Rizzieri was charged with two substantive counts, Counts Four and Five. Count Four charged Rizzieri, Ricco and Bragiole with distributing 461.9 grams of heroin on or about November 22, 1972.[7] As part of its proof of this transaction, the government called Special Agent Donald Ferrarone, who testified that on November 22, 1972 he bought 461.9 grams from one Peter Angiolillo, who was accompanied by Rizzieri. Agent Ferrarone further testified that he made two subsequent purchases of heroin from Rizzieri directly, first on February 8, 1973 and again on March 14, 1973, and that he arrested Rizzieri upon consummation of this last purchase.

Following his arrest by Agent Ferrarone on March 14, 1973 Rizzieri was indicted in the Eastern District of New York on a one count indictment charging him with the substantive offense of distribution of heroin on that date. He pleaded guilty to that charge in the Eastern District in July of 1973 and received a ten-year sentence. The record indicates that as of the date of the trial before Judge Lasker he had been held in Federal custody continuously since his arrest on March 14, 1973. No charges stemming from Rizzieri's participation in the drug sales to Agent Ferrarone on November 22, 1972 or February 8, 1973 were brought against him until the November 22 sale was charged in Count Four of the present indictment, filed on April 23, 1975, and evidence of all three transactions with Agent Ferrarone was introduced as proof of the conduct of the conspiracy charge in Count One.

Rizzieri contends that he was denied due process and his right to a speedy trial by the government's delay in

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7 Rizzieri was also convicted on Count Five, which charged him, Ricco and Bragiole with distributing two kilograms of heroin in November or December of 1972.

charging him with the November 22 and February 8 sales, and argues in support that at the time of the Eastern District indictment on the March 14 sale the government possessed all the evidence necessary to charge the November and February sales as well. However, he has shown neither that the government intentionally used that delay to gain a tactical advantage over him nor that he was prejudiced thereby, and therefore this claim fails. *United States* v. *Marion*, 404 U.S. 307, 324 (1971); *United States* v. *Eucker*, 532 F.2d 249, 255 (2d Cir. 1976); *United States* v. *Foddrell*, 523 F.2d 86, 87-88 (2d Cir.), *cert. denied*, 423 U.S. 950 (1975).

The proof at trial against Rizzieri on Count One, the conspiracy count, consisted largely of the testimony of Rossi, his co-conspirator. The proof incriminating Rizzieri on Count Four, which charged him with the distribution on November 22, 1972 to Agent Ferrarone, similarly rested heavily on Rossi, for Agent Ferrarone alone could testify merely to Rizzieri's silent attendance at the sale, which was transacted by Peter Angiolillo. Rossi's testimony strongly implicated Rizzieri, for it detailed the drug transactions which were occurring with great frequency during November, 1972 between the Riccos, Rossi and Rizzieri, and retail customers and other distributors, among whom was Angiolillo. Because Rossi did not even begin to cooperate with the government until March, 1974 the delay in charging Rizzieri up to that time was not at all improper. Nor does the delay from March, 1974 until the filing of the indictment in April, 1975 constitute "contrived procrastination", especially considering the complexity of the facts to which Rossi provided crucial information. *United States* v. *Schwartz*, 535 F.2d 160, 164 (2d Cir. 1976); *United States* v. *Eucker*, *supra*, 532 F.2d at 255; *United States* v. *Finklestein*, *supra*, 526 F.2d at 525-26. Furthermore, Rizzieri has failed to establish "actual prejudice", *United States* v.

Foddrell, supra, 523 F.2d at 88, for the five year term of imprisonment to which he was sentenced by Judge Lasker is concurrent with the ten year sentence he received in the Eastern District.

Similarly, there is no merit to Rizzieri's argument that his pleas of guilty in 1973 to the March 14, 1973 sale to Agent Ferrarone created a double jeopardy bar to his indictment on the instant charges. He was charged in the Eastern District solely with the substantive offense of distribution of heroin on March 14. The instant indictment charged him with conspiracy and two substantive counts, the November 22, 1972 sale to Ferrarone and another distribution in November or December of 1972. Since all of these charges differ either in law or in fact from the Eastern District charge to which Rizzieri pleaded guilty, and the evidence introduced against him in the trial below differed from the evidence which would have been used to support his Eastern District conviction, the double jeopardy claim must fail. *United States* v. *Papa,* 533 F.2d 815, 820 (2d Cir. 1976); *United States* v. *Cala,* 521 F.2d 605, 607 (2d Cir. 1975); *United States* v. *Ortega-Alvarez, supra,* 506 F.2d at 457-58.

The fact that the 1973 Eastern District conviction arose from a sale which was also part of the present conspiracy is not enough to establish a double jeopardy claim, for multiple and distinct violations of the narcotics laws arising out of a single transaction may be tried separately, *United States* v. *Nathan,* 476 F.2d 456, 458-459 (2d Cir.), *cert. denied,* 414 U.S. 823 (1973), and a "charge of a wide-ranging narcotics conspiracy consisting of numerous transactions is certainly sufficiently distinct from a charge of a substantive violation based on a single sale." *United States* v. *Ortega-Alvarez, supra,* 506 F.2d at 457. *See also United States* v. *Cioffi,* 487 F.2d 492 (2d Cir. 1973), *cert. denied,* 416 U.S. 995 (1974); *United States* v. *Campisi,* 248 F.2d

102, 107 (2d Cir.), *cert. denied,* 355 U.S. 892 (1957). Rizzieri's conviction for substantive violations raises no double jeopardy problem since the transactions underlying them were not the same as the sale involved in his 1973 guilty plea. *See, e.g., United States* v. *Ortega-Alvarez, supra,* 506 F.2d at 458 n. 3.

Ricco Severance

Ricco claims that certain concessions made by codefendant Rizzieri through his counsel were so antagonistic to Ricco's own defense that the trial judge committed reversible error in denying his motion for severance. The matter of severance is one addressed to the trial court's discretion, *see* Rule 14, Fed. R. Crim. P.; *Opper* v. *United States,* 348 U.S. 84 (1954); *United States* v. *Bernstein, supra,* 533 F.2d at 789, and since we find no abuse of that discretion in the trial court's denial of his motion, Ricco's claim must fail. *United States* v. *Turcotte,* 515 F.2d 145, 150-151 (2d Cir.), *cert. denied,* 423 U.S. 1032 (1975); *United States* v. *Jenkins,* 496 F.2d 57, 67-68 (2d Cir. 1974), *cert. denied,* 420 U.S. 925 (1975). A review of the record satisfies us that since Rizzieri's defense strategy was in fact entirely compatible with Ricco's, Ricco was not prejudiced by the joint trial.

Rizzieri and Rossi were named together in Count One, the conspiracy count, Count Four, charging the sale of November 22, 1972 to which agent Ferrarone testified, discussed above, and Count Five, charging a sale which occurred sometime in November or December of 1972. Rizzieri's defense as to Counts Four and Five was simply to deny any involvement in the heroin transactions charged therein. As to the conspiracy charge, Rizzieri admitted that he participated in the heroin transactions of February 8 and March 14, 1973, to which Agent Ferrarone had

testified, but disclaimed any connection with the Riccos, his alleged co-conspirators, by denying that they had supplied the heroin he sold to Ferrarone.

The defense presented to the jury by Rizzieri was thus in no way antagonistic to Ricco's, which consisted essentially of a denial of his participation in any of the narcotics transactions with which he was charged.[8] Both Rizzieri and Ricco denied participating in the heroin sales they were jointly accused of in the substantive counts (Counts Four and Five). Ricco denied his membership in the conspiracy charged, and Rizzieri did the same, disassociating himself from Ricco by conceding he made the heroin sales to Agent Ferrarone in February and March of 1973 while insisting that his source of the drug was someone other than Ricco or Bragiole. We thus find no reason to conclude that Ricco suffered "substantial prejudice" as a consequence of being tried jointly with Rizzieri. *United States* v. *Borelli*, 435 F.2d 500, 502-03 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *see, e.g., United States* v. *Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972).

Nor is our conclusion as to the lack of prejudice altered by the fact that Rizzieri's attorney elicited testimony incriminating both Ricco and Rizzieri while cross-examining Agent Ferrarone concerning the sale Rizzieri conceded making to him on March 14, 1973. In an effort to establish firmly that his client's source of heroin on that occasion was someone other than the Riccos, Rizzieri's counsel asked Agent Ferrarone whether Peter Donovan, Rizzieri's companion who was arrested along with him at the March 14 sale, had told Ferrarone that Rizzieri had obtained the narcotics from Ricco. Although Rizzieri's counsel had earlier announced his intention to pursue this line of question-

8 Ricco was convicted of four substantive counts in addition to the conspiracy charge.

ing, counsel for Ricco chose to object only after Ferrarone had answered three times, in response to repeated questions from counsel and the trial judge that Donovan had indeed stated to him that Rizzieri identified Bragiole as the source of the heroin Rizzieri had sold to Ferrarone. Far from being a defense tactic by Rizzieri, the revelation of this information linking him with Bragiole flatly contradicted his own defense to the conspiracy charge. Having evidently anticipated that Ferrarone would testify that Ricco had not been named as Rizzieri's source for the March 14 transaction, Ricco cannot utilize this apparent error in trial strategy to "overcome the difficult burden of demonstrating sufficient prejudice to have warranted severance."[9] *United States* v. *Finklestein, supra*, 526 F.2d at 525.

Government's Summation

The various attacks on the propriety of the government's summation merit only brief discussion. Remarks by the Assistant United States Attorney to the effect that the government accomplice witnesses would be subject to indictment for perjury and other previously uncharged offenses in the event they testified falsely were amply supported by testimony already before the jury and did not prejudice the appellants. These comments did not amount to the government's improper vouching for its accomplice witnesses but simply constituted permissible argument to the effect that these witnesses, whose veracity and credibility had been fiercely attacked by defense counsel, had no

9 Appellant Ricco also contends here that the trial judge erred in not striking the testimony once the hearsay objection was raised. Having failed to raise the objection in a timely manner under the circumstances, however, counsel waived it. *United States* v. *Parnes*, 210 F.2d 141, 143 (2d Cir. 1954); *see, e.g., Marx* v. *United States*, 86 F.2d 245, 251 (8th Cir. 1936).

motive to testify falsely. *United States* v. *Aloi*, 511 F.2d 585, 597-98 (2d Cir.), *cert. denied*, 423 U.S. 1015 (1975); *United States* v. *Koss*, 506 F.2d 1103, 1112-13 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *see also United States* v. *Wilner*, 523 F.2d 68, 73-74 (2d Cir. 1975). *Cf. United States* v. *Gonzales*, 488 F.2d 833 (2d Cir. 1973).

The claim that the prosecutor exceeded the bounds of fair comment in his rebuttal summation by offering his opinion on the worth of the government's Witness Protection Program must also fail. Timely objection was taken and sustained by the trial court who carefully avoided any prejudice to appellants by repeating his instruction to the jury that it and not counsel was the sole judge of the credibility of witnesses. The prosecutor's comment came in response to allegations made by defense counsel in their summations to the effect that the government was improperly paying its witnesses in order to obtain their testimony and that the Witness Protection Program was about to be revealed as a major government scandal. In this context and in light of the trial court's prompt and complete curative instruction, the government's comment cannot be considered to be basis for reversal. *See United States* v. *Canniff*, 521 F.2d 565, 571-73 (2d Cir. 1975); *cert. denied*, 423 U.S. 1059 (1976); *United States* v. *Tramunti*, *supra*, 513 F.2d at 1118-19.

We have carefully considered the other contentions raised by appellants and find them to be wholly groundless. Accordingly, the judgments of conviction are affirmed.